



**NOTICE OF WRITTEN *EX PARTE*
PRESENTATION**

February 28, 2006

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Portals II, Room TW-A325
Washington, DC 20554

**Re: Jurisdictional Separations and Referral to the Federal-State Joint Board,
 CC Docket No. 80-286; Federal State Joint Board on Universal Service,
 CC Docket No. 96-45**

Dear Ms. Dortch:

On January 20, 2006, the United States Telecom Association proposed that the Commission should adopt a Notice of Proposed Rulemaking, addressing jurisdictional separations reform, and should at the same time adopt a contingent, interim extension of the current separations freeze. The attached memorandum points out accurately, that the USTA proposal for process is inconsistent with the express requirements of the Telecommunications Act. The memorandum is agnostic on the relative merit of another extension of the freeze. The State members of the Federal State Joint Board on Separations wanted to be sure that the record of this proceeding reflects the clear legal flaws of the USTA proposal.

In accordance with section 1.1206(b)(2) of the Commission's rules, this letter is being filed electronically on behalf of those State members with your office. Please feel free to contact me at 202.898.2207 or jramsay@naruc.org if you have any questions.

Sincerely,

James Bradford Ramsay
General Counsel, NARUC

cc: Ian Dillner, Office of the Chairman
 Dana Shaffer, Office of Commissioner Tate, Federal Chair Separations Joint Board
 Jessica Rosenworcel, Office of Commissioner Copps
 Scott Bergman, Office of Commissioner Adelstein
 Tom Navin, Wireline Competition Bureau Chief

MEMORANDUM ON THE PROCEDURAL REQUIREMENTS FOR EXTENDING THE SEPARATIONS FREEZE

Filed by the State Members of the Federal State Joint Board on Separations

USTA filed a whitepaper at the FCC urging the FCC to extend the freeze without giving advance notice or opportunity for comment and without referring the matter first to the Joint Board.¹ This memorandum addresses these two procedural issues, but does not address the merits of extending the freeze.

In summary, any freeze extension must be preceded by a Notice of Proposed Rulemaking and by referral to the Joint Board. If the FCC acts without rulemaking, it would be subject to reversal if a state or NARUC should appeal, and (depending on the circumstances) states might be free to disregard its action when setting intrastate rates.

A. Acting By Order or Rule

The separations freeze expires on June 30 by the explicit terms of Part 36. Therefore, absent additional action, the pre-freeze rules that describe classical separations will revive on July 1.

Even when they act on their own motion, agencies may alter their own regulations. They must, however, have sufficient reason to act, and they must follow applicable procedures. An agency is entitled to have second thoughts on its policies and rules, and it may take actions it considers in the public interest upon whatever basis that mature reflection suggests. But “agencies may not keep regulations in place and then disregard them in order to disapprove actions taken by regulated entities to conform with those regulations. Doing so is the essence of arbitrary and capricious action.”²

Apparently recognizing this limitation USTA seems to suggest that the FCC should change the Part 36 rules, and not merely issue an order extending the freeze.³ This is good advice that would minimize conflict among the FCC, states and telephone companies. If the FCC were to merely issue an order -- that would force states to choose between complying with the order and complying with the rules. It is easy to imagine facts under which carriers might recover more or less than 100 percent of their costs.

B. Extending the Freeze Without Notice

If the FCC must alter its Part 36 rules, it must follow the Administrative Procedures Act. USTA contends the FCC may extend the freeze by adopting interim rules without advance notice. This is high-risk advice. An agency rule that violates the APA is void, and agency action taken under a void rule has no legal effect.⁴

USTA asserts that an interim freeze would “maintain the status quo so that the objectives of a pending rulemaking proceeding will not be frustrated.” USTA also says this would afford the FCC “sufficient time to implement comprehensive separations revisions in a manner that would cause the least upheaval in the industry.”⁵ USTA proposes that the freeze be extended until the FCC should take final action on that Notice of Proposed Rulemaking.

¹ United States Telecom Association, *White Paper, Paving the Way for Jurisdictional Separations Reform*, December 12, 2005, (hereafter “USTA paper”).

² *So. California Edison Co. v. FERC*, 415 F.3d 17, 23 (D.C. Cir. 2005) (internal quotations omitted).

³ USTA paper at 8 (arguing that agency may “implement a rule without public notice”).

⁴ *Alaska v. U.S. DOT*, 868 F.2d 441, 445 (D.C.Cir.1989).

⁵ USTA paper at 7, citations and internal quotations omitted.

The Administrative Procedures Act does allow an administrative agency to omit a rulemaking notice for “good cause.”⁶ USTA says this allows the FCC to omit notice in “appropriate circumstances.”⁷ In reality, the good cause standard is far more rigorous.

USTA relies upon *Mid-Tex Electric Cooperative, Inc. v. FERC*, a 1987 decision of the D.C. Circuit.⁸ USTA overstates the holding in that case. The court did uphold a FERC interim rule, adopted without notice and comment, that allowed electric utilities to collect “CWIP”⁹ payments.¹⁰ However, the court also said that the good cause standard should be “narrowly construed and reluctantly countenanced.” and that any good cause analysis is “inevitably fact- or context-dependent.”¹¹

The facts here are substantially different. In *Mid-Tex*, the FERC’s interim rule was a response to a court reversal of the underlying rule. Here the FCC has no comparable judicial, legislative or executive mandate. The text of the freeze rule made it clear to all in 2001 that the freeze would expire in the middle of 2006. Moreover, the state members of the Joint Board twice reminded the FCC of the problem by letter. The only argument now for “good cause” is a self-created hardship. The “good cause” exception “is not an escape clause that may be arbitrarily utilized at the agency’s whim;” it provides relief only in “emergency situations.”¹²

Second, the FERC’s interim rule in *Mid-Tex* was of short duration. The *Mid-Tex* court explained that tolerance of so-called temporary measures “installed without a public airing may give the agency an apparent incentive to proceed with its permanent rulemaking at a leisurely pace.”¹³ Here, however, USTA proposes that the extended freeze would continue until the FCC acts upon an NPRM, whenever that might be. The courts have not tended to approve “good cause” exceptions for interim measures of indefinite duration.¹⁴

Third, in *Mid-Tex* the FERC established safeguards adequate, at least on their face, to protect customers from injury from the interim rule.¹⁵ Here any imbalance against states could produce intrastate rate increases, and no refunds would be practicable.

Fourth, USTA proposes a freeze rule here of broad effect. The more expansive the regulatory reach of an agency’s rules, the greater the necessity for public comment.¹⁶

⁶ 5 U.S.C. § 553(b)(3)(B) (notice may be omitted “when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest”).

⁷ USTA paper at 8.

⁸ 822 F.2d 1123 (D.C. Cir. 1987).

⁹ “CWIP” stands for “construction work in progress,” a regulatory policy that allows utilities to add construction costs to rate base as they are incurred.

¹⁰ The court found that three factors (together but not alone) established good cause for omitting notice: 1) the interim nature of the order; 2) an earlier court had approved the “fundamental approach” in the interim rule, and it was supported by a “broad and substantial record;” and 3) utilities had placed “considerable reliance” on the rule. 822 F.2d at 1131-33.

¹¹ 822 F.2d at 1132; *see also* *Analysas Corp. v. Bowles*, 827 F.Supp. 20 (D.D.C. 1993); *Utility Solid Waste Activities Group v. EPA*, 236 F.3d 749 at 753 (D.D.C. 2001) (correction of an administrative error in a rule requires notice and comment, unless “good cause” exists).

¹² *Thrift Depositors of America, Inc. v. Office of Thrift Supervision*, 862 F.Supp. 586, 591 (D.D.C. 1994); *see also* *American Federation of Government Employees v. Block*, 655 F.2d 1153, 1156 (D.C.Cir.1981) (citing S.Rep. No. 752, 79th Cong., 1st Sess. (1945), *reprinted in* Administrative Procedure Act, Legislative History, 79th Cong. 1944-46 at 200-01).

¹³ *Id.*

¹⁴ *See also* *Thrift Depositors of America, Inc. v. Office of Thrift Supervision*, 862 F.Supp. 586, 593 (D.D.C. 1994) (absence of definite date for permanent rulemaking required reversal of agency action).

¹⁵ 822 F.2d at 1131 (FERC had declared willingness to hear complaints regarding complaints involving price squeezes).

¹⁶ *American Federation of Government Employees v. Block*, 655 F.2d 1153, 1156 (D.C.Cir.1981).

Finally, although the extended freeze would maintain the status quo, a freeze extension here would serve a purpose different from the FERC rule in *Mid-Tex*. The FERC's rule was a bridge between a first CWIP rule in which the court had previously found minor defects, and a future rule that the court anticipated would be generally similar. The agency's interim rule therefore improved the "continuity of ratemaking policy."¹⁷ Here, there is no reason to believe that a permanent freeze is desirable or even legally permissible.

In sum, if the FCC wishes to extend the freeze, it does not have "good cause" under the Administrative Procedures Act to omit advance notice and an opportunity for affected parties to comment.

C. Joint Board Participation

USTA urges the FCC to extend the freeze without participation of the Joint Board. First, USTA argues that the Joint Board statute only requires Joint Board participation whenever the FCC issues a Notice of Proposed Rulemaking. Since USTA believes no notice is required for this rule change, it also concludes that no referral is required.¹⁸ USTA's conclusion is correct only if notice is not required. For the reasons stated above, the FCC must give notice, and therefore it must consult with the Joint Board.

Alternatively, USTA argues that the Joint Board has already satisfied the statutory referral requirement. USTA relies upon a statement in the 2000 Recommended Decision of the Joint Board recommending "that the Commission institute the Part 36 factors and categories freeze for a five-year period or until the Commission takes further action in this docket."¹⁹ USTA reads this language as recommending that the freeze should continue for *at least* five years, and until the FCC takes "further action in this docket."

USTA's reading is contrary to the clear meaning of the 2000 Recommended Decision. USTA offers nothing to demonstrate that the Joint Board actually supported an indefinite freeze. The Joint Board recommend a freeze with a *maximum* of five years, but it recognized the possibility (now obviously unrealized) that prompt FCC action might have allowed the freeze to end sooner.²⁰

USTA's interpretation is clearly contrary to the contextual meaning as well. The very same paragraph of the Joint Board's Recommended Decision urged "that the freeze expire at the end of five years, unless extended by the Commission at the recommendation of the Joint Board."²¹ This language is clear, and it is totally incompatible with USTA's conclusion. The Joint Board never gave its consent to a freeze longer than five years.

Even assuming that USTA had correctly reported the Joint Board's intention, its argument is insufficient. Even if the 2000 Joint Board had recommended an indefinite freeze, the FCC did not enact an indefinite freeze. Instead, the FCC enacted a freeze of five years. To extend that freeze now, the FCC must follow the procedural requirements of law, and that requires referral to the Joint Board.

In summary, any freeze extension must be preceded by a Notice of Proposed Rulemaking and by referral to the Joint Board.

¹⁷ 822 F.2d at 1133.

¹⁸ USTA paper at 9.

¹⁹ USTA paper at 10, n.34, citing *Separations Reform and Referral to the Federal-State Joint Board*, Recommended Decision, FCC 00J-2, rel'd July 21, 2000, ¶ 26.

²⁰ Moreover, the Joint Board urged the FCC to address several particular issues and "a path to comprehensive reform in the near term." *Id.*, ¶ 27.

²¹ *Id.* ¶ 26.